

**IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF OKLAHOMA**

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State of Oklahoma,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	<b>Case No. 4:05-cv-00329-GKF-PJC</b>
	)	
Tyson Foods, Inc., et al.,	)	
	)	
Defendants.	)	
	)	

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**THE CARGILL DEFENDANTS’ REPLY ON MOTION TO STRIKE PLAINTIFFS’  
DAMAGES REPORTS OR TO COMPEL COMPLETE EXPERT DISCLOSURES**

Plaintiffs provide five responses to the Cargill Defendants’ Motion to Strike/Compel Complete Expert Disclosures. Notably, none of these responses address the case law the Cargill Defendants cite in support of their motion to strike. As stated in the Cargill Defendants’ opening brief, the text and purpose of Rule 26’s expert disclosure requirements make clear that Plaintiffs’ failure to disclose “a complete statement of all opinions the witness will express and the basis and reasons for them,” violates the Rule, which has as its purpose the elimination, limiting, and shortening of depositions; elimination of unfair surprise; and the conservation of resources. (See Dkt. No. 1938: Cargill Defs.’ Opening Br. at 8-11.) Plaintiffs also fail to address the Cargill Defendants’ arguments that the Court will be disadvantaged in judging whether Plaintiffs have met their burden to show the admissibility of their expert reports in light of their deficient disclosures. (Id. at 11-12.) As a result, the Cargill Defendants respectfully request the reports be stricken or complete expert disclosures be ordered.

**A. The Cargill Defendants’ Expert Disclosures Are Consistent with What They Seek From Plaintiffs**

As an example of the information that Plaintiffs were obligated to provide, Cargill Defendants direct the Court to the March 31, 2009 cover letter the Cargill Defendants attached to their damages experts' disclosures. (Dkt. No. 1955 at Ex. 15: Mar. 31, 2009 Hill Ltr.) Plaintiffs cite this letter in their response as proof the Cargill Defendants themselves are "hid[ing] the anticipated individual testimony" in multiple author reports. Nothing could be further from the truth, and Plaintiffs' excerpt of this letter is very misleading.

In their March 31, 2009 letter, the Cargill Defendants disclosed the following information for the two reports disclosed on that day:

1. Evaluation of Hypothetical Remediation Strategy Presented in Stratus Contingent Valuation Study: Illinois River Watershed.

This Report is a collaborative effort of Drs. Connolly, Sullivan, Coale. Recognizing the possible time limitations at trial, however, the defendants may call at trial John P. Connolly to testify to the matters addressed in sections 1 and 4 of the Report.

2. Expert Report of William H. Desvousges, PhD. and Gordon C. Rausser, PhD.

This Report is a collaborative effort of Drs. Desvousges and Rausser and each may address all matters in the Report. Recognizing, however, the possible time limitations at trial, the defendants may call at trial William Desvousges to testify as to all of the matters addressed [in] this report. The defendants may further call at trial Gordon Rausser to testify specifically as to the statistical and econometric analyses, and the results therefrom, in the Report.

(Id. at 2.)

The above, complete excerpt of the letter, demonstrates that the Cargill Defendants' expert disclosures—in stark contrast to Plaintiffs' expert disclosures—very clearly identifies which expert we expect to *testify* at trial, and the specific portions of the reports each will testify to, to the extent the expert is not an integrating expert. The Cargill Defendants' disclosures do

enable Plaintiffs to make informed decisions about which, if any, of the Cargill Defendants' damages experts Plaintiffs will depose.<sup>1</sup>

Plaintiffs, on the other hand, have never identified what topics each of their experts will testify to. Instead, they initially identified each of the seven experts of the future natural damages report as "primary authors" of the report, despite the varied backgrounds of their experts. (See Dkt. No. 1938 at 6, 8.) It was only after weeks of meet and confer email exchanges and multiple requests for the required, clarifying disclosures by Plaintiffs, that Plaintiffs disclosed a chart of "lead authors." (*Id.* at 4-6.) This chart also failed to comply with the Rule's disclosure requirements, as it listed between 5 to 6 authors for some of the key chapters of the report and provided no information as to what each expert would testify. (*Id.* at 5-6.)

#### **B. Plaintiffs' Other Arguments Against Disclosure Are Equally Without Merit**

Plaintiffs raise several other responses to the Cargill Defendants' motion, which merit a brief response. First, Plaintiffs claim the Cargill Defendants' motion is untimely. It is true that the Cargill Defendants engaged in a lengthy meet and confer process to try to resolve this issue without the Court's involvement. When Plaintiffs promised a chart of the roles and opinions of their testifying damages experts, the Cargill Defendants hoped this would resolve this dispute.

But, as noted, that chart was grossly deficient. (*Id.*)

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<sup>1</sup> The Cargill Defendants, on the other hand, have not been able to efficiently determine which of Plaintiffs' damages experts to depose. And despite the Cargill Defendants' willingness to allow Plaintiffs to take their expert depositions after the April 16, 2009, discovery cut-off, Plaintiffs have not extended the same courtesy to the Cargill Defendants. (See Ex. 1: April 2, 2009 Ehrlich email chain.) Thus, the Cargill Defendants are faced with taking each of Plaintiffs' seven damages experts' depositions between April 6, 2009 and April 16, 2009; and, absent court intervention, will have to take these depositions without knowing which expert is an integrating expert and to what topics each of the experts will testify.

Second, Plaintiffs contend that Rule 26 allows for reports prepared by multiple authors. The Cargill Defendants conceded this point in their opening brief. This dispute is not about how many experts can prepare a report. The issue is what disclosures are required by each of the authors of a report. (Id. at 7-10.) The problem of deficient expert disclosures is, of course, exacerbated when there are not two, not three, but *seven* authors of one report, as is the case with Plaintiffs' future damages report.

Third, Plaintiffs claim the Cargill Defendants received the disclosures they asked for. The lengthy record of the meet and confer process shows this is a false claim. (Id. at 3-7.) The Cargill Defendants consistently asked for adequate disclosures to determine which of Plaintiffs' damages experts needed to be deposed. (Id.) None of Plaintiffs' efforts to date have allowed this determination. (Id.)

Finally, Plaintiffs argue their natural resources damages reports should be admitted because they would "help" the Court. Again, the issue presented to the Court is whether Plaintiffs have complied with the expert disclosure requirements of Rule 26. They have not so complied. Even if their reports are substantively "helpful," the Court will be disadvantaged in determining whether Plaintiffs have met their duty under Daubert to show their reports are admissible. (Id. at 11-12.) Thus, Plaintiffs' deficient disclosures remain a detriment to the Cargill Defendants and to the Court.

### CONCLUSION

For the reasons set forth above, the Cargill Defendants respectfully request the Plaintiffs' natural resource damages reports be stricken or, in the alternative, that the Court enter an Order directing Plaintiffs to immediately produce clear statements of the opinions to which each of its seven natural resource damages experts will testify to at trial.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I certify that on the 2<sup>nd</sup> day of April, 2009, I electronically transmitted the attached document to the Clerk of Court using the ECF System for filing and transmittal of a Notice of Electronic Filing to the following ECF registrants:

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